



DEPARTMENT OF TRANSPORTATION

4910-9X

Office of the Secretary

49 CFR Part 10

[Docket No. OST-2014-0142]

RIN 2105-AE36

Maintenance of and Access to Records Pertaining to Individuals

AGENCY: Office of the Secretary (OST), U.S. Department of Transportation (DOT).

ACTION: Interim rule with request for comments.

SUMMARY: This rule conforms DOT's regulations on Maintenance of and Access to Records Pertaining to Individuals to the applicable System of Records Notices (SORNs) and current DOT practice. This rule adds the General Investigation Records System to the list of DOT Privacy Act Systems of Records that are exempt from one or more provisions of the Privacy Act. DOT also exempts the Personnel Security Record System from additional provisions of the Privacy Act, as well as correcting the identification number for that System. These exemptions were initially established in 1975; however, a 1980 rulemaking accidentally omitted these exemptions. These changes are effective immediately, though DOT invites public comment.

DATES: This rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. *Comment Closing Date:* Comments on the revised Appendix are due on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may file comments identified by the docket number DOT-OST-2014-0142 by any of the following methods:

- Federal Rulemaking Portal: Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.
- Hand Delivery or Courier: West Building Ground Floor, Room W12-140, 1200 New Jersey Ave. SE, between 9:00 a.m. and 5:00 p.m. ET, Monday through Friday, except Federal holidays.
- Fax: 202-493-2251.

Instructions: You must include the agency name and docket number DOT-OST-2014-0142 or the Regulatory Identification Number (RIN) for the rulemaking at the beginning of your comment. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Privacy Act: Anyone is able to search the electronic form of all comments received in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.) You may review DOT's complete Privacy Act statement in the *Federal Register* published on April 11, 2000 (65 FR 19477-78), or you may visit <http://DocketsInfo.dot.gov>.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> or to the street address listed above. Follow the online instructions for accessing the docket.

FOR FURTHER INFORMATION CONTACT: Claire Barrett, Departmental Chief Privacy Officer, Office of the Chief Information Officer, U.S. Department of Transportation, 1200 New Jersey Avenue, SE, Washington, DC 20590 or claire.barrett@dot.gov or (202) 366-8135.

SUPPLEMENTARY INFORMATION: The Privacy Act of 1974, 5 U.S.C. 552a, requires that agencies tell the public when they maintain information about a person in a file which may be retrieved by reference to that person's name or some other identifying particular. A group of these files is a "system of records," and the existence of each system must be published in a "system of records notice" (SORN). An agency wishing to exempt portions of some systems of records from certain provisions of the Privacy Act must notify the public of that exemption in both the SORN and in an exemption rule. This rule clarifies that portions of the General Investigations Records System and Personnel Security Records System are not subject to some access and notification provisions of the Privacy Act. Exempting the systems from these requirements is necessary to protect the public's interest in fair and accurate investigations.

The DOT identifies a system of records that is exempt from one or more provisions of the Privacy Act (pursuant to 5 U.S.C. 552a(j) or (k)) both in the SORN published in the Federal Register for public comment and in an Appendix to DOT's regulations implementing the Privacy Act (49 CFR part 10, Appendix). This rule amends the Appendix by exempting those portions of the General Investigations Records System

(DOT/OST 016) compiled in the context of an investigation from all portions of the Privacy Act, except the following subsections: (b) (Conditions of disclosure); (c)(1) and (2) (Accounting of certain disclosures); (e)(4)(A) through (F) (Publication of existence and character of system); (e)(6) (Ensure records are accurate, relevant, timely, and complete before disclosure to person other than an agency and other than pursuant to a Freedom of Information Act request); (e)(6) (Ensure records are accurate, relevant, timely, and complete before disclosure to person other than an agency and other than pursuant to a Freedom of Information Act request); (e)(7) (Restrict record keeping on First Amendment Rights); (e)(9) (Rules of conduct); (e)(10) (Safeguards); (e)(11) (Routine use publication); and (i) (Criminal penalties).

This rule also exempts records in the General Investigations Records System from subsections (c)(3) (Accounting of Certain Disclosures) and (d) (Access to Records) to the extent that records consist of investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of the Privacy Act, or are properly classified in accordance with 5 U.S.C. 552a(b)(1). Properly classified material in the System is additionally exempt under this rule from subsections (e)(4)(G) through (I) (Agency Requirements) and (f) (Agency Rules) of the Privacy Act.

Additionally, this rule exempts those portions of records in the Personnel Security Records System (DOT/OST 035) that would reveal the identity of a source who furnished information to the Government under an express or, prior to September 27, 1975, an implied promise of confidentiality, from the following subsections of the Privacy Act: (c)(3) (Accounting of Certain Disclosures), (d) (Access to Records), (e)(4)(G) through (I) (Agency Requirements), and (f) (Agency Rules). We also correct an error by replacing

an incorrect reference to the identification number of this System, DOT/OST 016, with the correct identification number of DOT/OST 035.

These exemptions were initially adopted as part of the establishment of 49 CFR part 10, published at 40 FR 45729, effective September 29, 1975, and amended by 40 FR 57361 on November 26, 1975. Since that time, DOT has claimed these exemptions in its published SORNs for both of these Systems. On January 30, 1980, DOT republished the Appendix at 45 FR 8993, and summarized the changes as making minor amendments reflecting organizational changes within DOT, adding three limited exemptions for investigatory files, and changing procedures relating to disclosure of medical records. Notwithstanding this explanation, the republished Appendix omitted the exemptions. Despite the absence of the exemptions in the Appendix, DOT has nevertheless continued to refer to them. Since the 1980 error, we have heard no complaints from the public on this matter. This rule conforms the Appendix to Part 10 to, both to the applicable SORNs and current DOT practice and thus will have no substantive impact on the public. Therefore, DOT finds that there is good cause under 5 U.S.C. 553(d)(3) to make this rule effective less than 30 days after publication in the Federal Register.

The DOT also finds that notice and comment are unnecessary and that the rule is exempt from prior notice and comment requirements under 5 U.S.C. 553(b)(3)(A). Notice and comment would be contrary to the public interest because in the absence of these exemptions, DOT may be required to provide an accounting of disclosures to the subject of an investigation, thereby permitting the subject of the investigation to take measures to impede the investigation, as by destroying evidence or intimidating witnesses. Additionally, DOT would be required to disclose the identity of informants who promised infor-

mation under an express promise of confidentiality. This would hamper DOT's ability to obtain complete and accurate statements from witnesses and chill individuals from providing DOT with information necessary for investigations. These disclosures would not serve the public interest of ensuring that investigations are as accurate as possible. Interested persons are still welcome to comment, and DOT will respond to any comments received on or before the closing of the comment period (see DATES).

Regulatory Analysis and Notices:

A. Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The DOT has considered the impact of this rulemaking action under Executive Orders 12866 and 13563 (January 18, 2011, "Improving Regulation and Regulatory Review"), and the DOT's regulatory policies and procedures (44 FR 11034; February 26, 1979).

The DOT has determined that this action does not constitute a significant regulatory action within the meaning of Executive Order 12866 and within the meaning of DOT regulatory policies and procedures. This rule has not been reviewed by the Office of Management and Budget. There are no costs associated with this rule.

B. Regulatory Flexibility Act

Because no notice of proposed rulemaking is required for this rule under the Administrative Procedure Act, 5 U.S.C. 553, the provisions of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612) do not apply. Even so, DOT has evaluated the effects of these changes on small entities and does not believe that this rule would impose any costs on small entities because the reporting requirements themselves are not changed and because the rule applies only to information on individuals that is maintained by the Federal

Government. Therefore, I hereby certify that this proposal will not have a significant economic impact on a substantial number of small entities.

C. National Environmental Policy Act

The agency has analyzed the environmental impacts of this proposed action pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979). Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). See 40 CFR 1508.4. In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. *Id.* Paragraph 3.c.5 of DOT Order 5610.1C incorporates by reference the categorical exclusions for all DOT Operating Administrations. This action is covered by the categorical exclusion listed in the Federal Highway Administration's implementing procedures, "[p]romulgation of rules, regulations, and directives." 23 CFR 771.117(c)(20). The purpose of this rulemaking is to make a correction to the Appendix to DOT's Privacy Act regulations. The agency does not anticipate any environmental impacts and there are no extraordinary circumstances present in connection with this rulemaking.

D. Executive Order 13132

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 dated August 4, 1999, and it has been determined that it does not

have a substantial direct effect on, or sufficient federalism implications for, the States, nor would it limit the policymaking discretion of the States. Therefore, the preparation of a Federalism Assessment is not necessary.

E. Executive Order 13084

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 (“Consultation and Coordination with Indian Tribal Governments”). Because it has no effect on Indian Tribal Governments, the funding and consultation requirements of Executive Order 13084 do not apply.

F. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The DOT has determined that this action does not contain a collection of information requirement for the purposes of the PRA.

G. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4, 109 Stat. 48, March 22, 1995) requires Federal agencies to assess the effects of certain regulatory actions on State, local, and tribal governments, and the private sector. The UMRA requires a written statement of economic and regulatory alternatives for proposed and final rules that contain Federal mandates. A “Federal mandate” is a new or additional enforceable duty, imposed on any State, local, or tribal Government, or the private sector. If any Federal mandate causes those entities to spend, in aggregate, \$143.1 million or more in any one year (adjusted for inflation), an UMRA analysis is required. This rule

would not impose Federal mandates on any State, local, or tribal governments or the private sector.

List of Subjects in 49 CFR Part 10

Penalties, Privacy.

In consideration of the foregoing, DOT amends part 10 of title 49, Code of Federal Regulations, as follows:

1. The authority citation for part 10 continues to read as follows:

AUTHORITY: 5 U.S.C. 552a; 49 USC 322.

2. Amend the Appendix to Part 10 by:

- a. In Part I, adding paragraph D; and

- b. In Part II, adding paragraphs B.3., D.4, and F.4. and revising paragraph F.2.

The revisions and additions read as follows:

APPENDIX TO PART 10 - EXEMPTIONS

Part I. General Exemptions

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D. General Investigations Record System, maintained by the Office of Investigations and Security, Office of the Secretary (DOT/OST 016).

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Part II. Specific Exemptions

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B. * * *

3. General Investigations Record System, maintained by the Office of Investigations and Security, Office of the Secretary (DOT/OST 016).

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D. * * *

4. Personnel Security Records System, maintained by the Office of Investigations and Security, Office of the Secretary (DOT/OST 035).

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F. * * *

2. Personnel Security Records System, maintained by the Office of Investigations and Security, Office of the Secretary (DOT/OST 035).

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4. General Investigations Record System, maintained by the Office of Investigations and Security, Office of the Secretary (DOT/OST 016).

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Issued in Washington, DC, on September 24th, 2014, under authority delegated in 49 CFR 1.27(c).

Kathryn B. Thomson,

General Counsel.

[FR Doc. 2014-23470 Filed 10/01/2014 at 8:45 am;

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